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The APA Procedural Rule Exemption: Looking for a Way to Clear the Air

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PREFACE

In the Summer 1991 issue of the Administrative Law Journal of The American University, Tracy Corell Hauser published *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement— A Survey of Cases.*[1] Hauser's useful survey sought to clarify the current confusion that exists in defining a procedural rule for the purposes of the APA's exemptions from rulemaking requirements. In her analysis of the case law, she concludes that the "substantial impact" test is still the operative test, and that this test is "a viable means to distinguish substantive from procedural rules."[2] She also concludes that "[a] new test, however, is in the making."[3]

Our analysis and purpose differ significantly from Hauser's. We propose an alternative to the various existing tests that courts have applied in determining whether a particular rule should be exempt from notice-and-comment requirements because it is a rule of procedure or process. We prepared this article in connection with the Administrative Conference of the United States' consideration of this issue.[4] However, the views expressed in this article are the authors' and do not necessarily represent the views of the Administrative Conference or its members.

INTRODUCTION

Section 553 of the Administrative Procedure Act (APA)[5] contains

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1. Tracy Corell Hauser, Survey, *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement—A Survey of Cases*, 5 ADMIN. L.J. AM. U. 519, 552 (1991).
2. *Id.* at 552.
3. *Id.* at 553.
4. The text of ACUS Recommendation 92-1, approved by the Conference in June 1992, 57 Fed. Reg. 30,102 (July 8, 1992) (to be codified at 1 C.F.R. § 305.92-1), is reproduced in the Appendix.
5. Administrative Procedure Act (APA), Pub. L. No. 74-404, 60 Stat. 237 (1946)

the procedural requirements for notice-and-comment rulemaking. It requires that an agency publish notice and provide opportunity for public comment before adopting a rule.[6] It also provides for several specific exceptions to these requirements. For example, the requirements for notice and comment do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[7] An even broader exception is provided for "a matter relating to agency management or personnel."[8]

The scope of APA exceptions concerning notice-and-comment rules has been described as "enshrouded in considerable smog,"[9] and the term "procedural rule" has no clear definition.[10] This issue is currently in a state of flux, due in part to the decision of the Court of Appeals for the District of Columbia Circuit in *Air Transport Association v. Department of Transportation*.[11] In that case, the court held that rules establishing the procedures for adjudicatory hearings under the Federal Aviation Administration's (FAA) Administrative Civil Penalty Program were not exempt as procedural rules from the APA's notice-and-comment requirements. Stating that the procedural rule exception applied to "housekeeping rules" and was reserved for rules organizing an agency's "*internal* operations,"[12] the court held that the FAA regulations "encoded a substantive value judgment" by "substantially affect[ing] a civil penalty defendant's *right to an administrative adjudication*."[13] Abjuring the distinction between "procedure" and "substance," the court distinguished instead between "rules affecting . .

(codified as amended in scattered sections of 5 U.S.C.).

6. 5 U.S.C. § 553(b) (1988).

7. *Id.* § 553(b)(A).

8. *Id.* § 553(a)(2). This provision exempts such rules not only from notice-and-comment requirements, but from all of § 553, including its requirement to publish a statement of basis and purpose.

9. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975); *see also* Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

10. The term "procedural rule" as used here and by most courts that have considered the subject, refers generally to "rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(A) (1988). *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979); American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).

11. 900 F.2d 369 (D.C. Cir. 1990), *judgment vacated and remanded*, ___ U.S. ___, 111 S. Ct. 944 (1991). The Supreme Court remanded the case to the Court of Appeals for a determination on the question of mootness. The Court of Appeals vacated the opinion and dismissed the petition for review as moot. 933 F.2d 1043 (D.C. Cir. 1991).

12. Air Transp. Ass'n v. Department of Transp., 900 F.2d at 376 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979)).

13. *Id.* (quoting American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (emphasis in original)) .

. 'the rights or interests of regulated' parties, . . . and [rules affecting] agencies' 'internal operations'."[14] A strong dissent criticized the majority's "abandon[ment]" of the "procedural/substantive" dichotomy, and proposed a test of whether the rule regulates "primary conduct."[15] The Supreme Court accepted the government's petition for *certiorari* in the case, but subsequently vacated the lower court's decision and remanded it for consideration of the issue of mootness.[16] Thus, the question remains unsettled.[17]

The Administrative Conference has already addressed the scope of most of the other major exceptions to the APA rulemaking requirements.[18] Because the procedural rule exception is increasingly controversial, it is an appropriate time for the Conference to consider filling this gap in its recommendations.

I. THE APA REQUIREMENTS

As noted above, section 553(b)(A) exempts from notice-and-comment requirements "rules of agency organization, procedure or prac-

14. *Id.*

15. *Id.* at 378 (quoting American Hosp. Ass'n v. Bowen, 834 F.2d at 1041, 1047).

16. *Id.* at 382 (Silberman, J., dissenting).

17. Although the opinion was vacated and the case dismissed on mootness grounds, the D.C. Circuit's decision on the merits may continue to have precedential weight. *See, e.g.*, Action Alliance of Senior Citizens v. Sullivan, 930 F.2d 77, 83 (D.C. Cir. 1991) (stating that decisions, vacated on other grounds, continue to have precedential weight on other issues in absence of contrary authority); Hopkins v. Price Waterhouse, 920 F.2d 967, 975 & n.5 (D.C. Cir. 1990) (stating that Supreme Court's vacating of court of appeals' decision on one issue does not affect precedential value of issues not raised on appeal); Christianson v. Colt Indus. Operating Corp., 870 F.2d 1292, 1298 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 81 (1989) (stating that "although vacated, the [cited] decision stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"); Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010, 107 S. Ct. 3240 (1987) (explaining that decision vacated by Supreme Court remains persuasive precedent so long as Court did not reject its underlying reasoning).

In fact, *Air Transport* has been cited, albeit in dicta, in cases considering the need for notice and comment for rules of procedure. Moore v. Madigan, No. 91-0029-CV-W-2, slip op. at 10 (W.D. Mo. Mar. 30, 1992).

18. *See* ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS, ACUS RECOMMENDATION NO. 69-8, 1 C.F.R. § 305.69-8 (1992) (detailing § 553(a)(2) rules pertaining to "public property, loans, grants, benefits, or contracts"); ELIMINATION OF THE "MILITARY OR FOREIGN AFFAIRS FUNCTION" EXEMPTION FROM APA RULEMAKING REQUIREMENTS, ACUS RECOMMENDATION NO. 73-5, 1 C.F.R. § 305.73-5 (1992) (detailing § 553(a)(1)); INTERPRETIVE RULES OF GENERAL APPLICABILITY AND STATEMENTS OF GENERAL POLICY, ACUS RECOMMENDATION NO. 76-5, 1 C.F.R. § 305.76-5 (1992) (detailing § 553(b)(A)); THE "GOOD CAUSE" EXEMPTION FROM APA RULEMAKING REQUIREMENTS, ACUS RECOMMENDATION NO. 83-2, 1 C.F.R. § 305.83-2 (1992) (detailing § 553(b)(B), where agencies find that notice and comment are "impracticable, unnecessary, or contrary to the public interest").

tice."[19] The statute does not define those terms explicitly. A separate subsection of section 553 does, however, exempt rules involving "matters of agency management or personnel" from all of section 553's requirements.[20] Because agency "housekeeping rules" seem to fall within the latter, broader exemption for rules involving agency management, it does not seem consistent with either logic or grammar to limit the procedural rule exemption to "housekeeping rules."

Furthermore, the Attorney General's Manual on the APA, a document whose importance in understanding the APA has long been recognized, treats "rules of agency organization, procedure, or practice" as coextensive with the rules required to be published, stating: "[T]he rules of organization and procedure which an agency must publish pursuant to [APA] section [552](a)(1) and (2) are not ordinarily subject to the requirements of [APA] section [553](a) and (b)."[21] At the time it was enacted, section 552(a) applied to:

> (1) descriptions of [an agency's] central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; and, (2) statements of the general course and method by which its functions are channeled and determined, including the *nature and requirements of all formal or informal procedures* available as well as forms and instructions as the scope and contents of all papers, reports, or examinations.[22]

Thus, as originally enacted and interpreted, the APA's procedural rule exemption appears to cover a much broader range of rules than only "housekeeping" rules. Procedural rules of the type at issue in *Air Transport*, i.e., rules governing formal adjudicatory procedures, would seem to fit within this statutory exemption.

II. JUDICIAL INTERPRETATIONS

There are relatively few significant cases on the scope of the procedural rule exemption, and those cases are inconsistent. The problem in this area, as in other areas of law, is that the distinction between procedure and substance is not always clear. Most courts recognize the diffi-

19. 5 U.S.C. § 553(b)(A) (1988).

20. *Id.* § 553(a)(2).

21. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, U.S. DEPARTMENT OF JUSTICE 5, 30, (1947) *reprinted in* ACUS FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (2d ed. 1992) [hereinafter ATTORNEY GENERAL'S MANUAL]. Sections 553(a) and (b) contain the requirements for notice and opportunity for public comment in informal rulemaking.

22. *Id.* (emphasis added). Section 552 has since been amended. The original provision in § 3 of the APA (now § 552) is, however, instructive in determining the original intention.

culty of this analysis, and some courts, such as the D.C. Circuit in *Air Transport*, have substituted other (and to us, nonstatutory) tests. Courts employ various methods to analyze the issue, and they are summarized below.

A. "Procedural means procedural"

One approach to whether a particular rule comes within the "procedural rule" exemption depends simply upon whether it addresses some sort of agency procedure. The Ninth Circuit adopted this approach in *Southern California Edison Co. v. Federal Energy Regulatory Commission*,[23] when it reviewed Federal Energy Regulatory Commission (FERC) rules establishing procedures for approving certain types of rates. The court rejected the argument that the rules should be subject to notice-and-comment requirements because they had a "substantive effect." Instead, the court held that the exemption extended to "technical regulation of the form of agency action and proceedings."[24] Because the regulations "pertain[ed] to the procedural aspects of FERC's approval of . . . rates: intervention, requests for refunds for interim rates and for final confirmation and approval,"[25] the court found that they fell within the APA exemption.

B. "Substantial impact"

Other courts, recognizing that substance can sometimes wear a procedural face and that rules appearing to be procedural can affect substantive rights, have developed a "substantial impact" standard for determining whether a rule should be exempt from the notice-and-comment requirements. This test, which appears to have first surfaced in *National Motor Freight Ass'n v. United States*,[26] subjects a rule otherwise covered by one of the APA exemptions to notice-and-comment procedures if it has a "substantial impact" on the regulated community or their rights and interests.[27] The focus of this test is on the

23. 770 F.2d 779 (9th Cir. 1985).
24. *Id.* at 783 (quoting Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974)).
25. *Id.*
26. 268 F. Supp. 90 (D.D.C. 1967) (three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968) (holding Interstate Commerce Commission promulgation of informal procedures for restoration of past changes to shippers invalid because procedures were not exempted from APA's notice-and-comment requirements).
27. *See generally* Brown Express, Inc. v. United States, 607 F.2d 6905 (5th Cir. 1979) (holding ICC elimination of notification practice not exempt due to its substantial impact). *Cf.* Department of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984). Hauser describes *Kast Metals* as applying the "substantial impact" test.

magnitude of a rule's impact, not on the *nature* of that impact. Where a procedural rule's impact reaches a certain undefined level, it is subject to notice and comment prior to promulgation.[28] Although several courts have used the "substantial impact" test, it is no longer the sole criterion for determining whether notice and comment should be required.[29] It has not, however, been completely abandoned.[30]

C. *"Encoding a substantive value judgment"*

Perhaps recognizing that a test based totally on magnitude of impact is inadequate to determine whether a rule is a "procedural rule," several D.C. Circuit cases have used a test that focuses on whether the particular rule "encodes a substantive value judgment."[31] This test originated in *American Hospital Ass'n v. Bowen.*[32] The court noted that exceptions to the notice-and-comment requirements are narrow, and should be limited to reflect the requirements' purposes. Those purposes are "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies" and to "assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."[33] In the context of the procedural rule exception, the court noted the shift away from the "substantial impact" test toward a determination of whether "the agency action also encodes a substantive value judgment or puts a

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Hauser, *supra* note 1, at 532. Although the court does use the language of substantial impact, its analysis focuses not on the magnitude of the impact, but rather on whether the type of impact (effect of OSHA's inspection priorities) is one against which the plaintiff was entitled to protection. *Department of Labor v. Kast Metals Corp.*, 744 F.2d at 1153.

28. The test has also been applied in the context of interpretive rules, *e.g.*, Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974) (holding that Board of Parole rules, which concerned eligibility requirements for parole, were not exempt from notice-and-comment requirements of APA).

29. American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (explaining that over time, test for determination of exemption for procedural rules in § 553 of APA has "gradually shifted focus from asking whether a given procedure has a 'substantial impact' on parties . . . to inquiring more broadly whether the agency action also encodes a substantive value judgment . . . on a given type of behavior").

30. Air Transp. Ass'n v. Department of Transp., 900 F.2d 369, 376 (D.C. Cir. 1990) (noting that FAA rules of practice "substantially affect a civil penalty defendant's right to an administrative adjudication").

31. We view this as a separate test. Hauser, on the other hand, views it as "merely the substantial impact test with a new name." Hauser, *supra* note 1, at 544.

32. 834 F.2d 1037 (D.C. Cir. 1987).

33. *Id.* at 1044 (quoting Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) and Guardian Fed. Sav. & Loan Corp. v. FSLIC, 589 F.2d 658, 662 (D.C. Cir. 1978)).

stamp of approval or disapproval on a given type of behavior."[34]

In *American Hospital*, the court deemed "procedural" a number of agency directives and transmittals relating to the operation of the Medicare program's peer review organization (PRO) program.[35] These documents contained a "wide variety of instructions, guidelines and procedures covering aspects of the PRO program."[36] Many of the guidelines related to enforcement strategy, and contained fairly specific standards for what kind of hospital activity would result in PRO review.[37] The court did not explain how the "encodes a substantive value judgment" test actually should be applied, but rather simply concluded that new substantive burdens would not result from the rules.[38]

Shortly thereafter, the D.C. Circuit applied the *American Hospital* "encoding" test, but with a different result, in *Reeder v. FCC*.[39] This case involved FCC procedures concerning radio station requests for channel upgrades. The court held that amended procedures, which related to the timing of applications, had the effect of changing the substantive criteria for substituting, and thereby upgrading, channel allotments assigned to license holders.[40] Because the "procedures" were determined to have a substantive effect, the court insisted on notice and comment.

Air Transport is perhaps the most recent "encoding" case.[41] This case involved the FAA's rules of practice for the formal adjudications of administrative civil penalties in cases involving violations of air safety regulations. The rules addressed such matters as discovery, briefing, and evidentiary issues. While the content of some of the rules was fairly controversial, they were clearly a set of practice rules relating to the enforcement proceedings themselves. The rules did not address the substance of air safety regulations that were being enforced through civil penalties.

Nonetheless, the court eschewed any attempt to distinguish whether the rules were "procedural" or "substantive," opting instead for what it termed a "functional analysis."[42] The court's primary ground for holding that the rules at issue fell outside of the exemption was that "they

34. *Id.* at 1047. The court gave no citation for the origin of this test.
35. *Id.* at 1050-52.
36. *Id.* at 1043.
37. *American Hosp.*, 834 F.2d at 1049, 1051. The court noted that agency enforcement plans warrant considerable deference. *Id.* at 1050.
38. *Id.* at 1052.
39. 865 F.2d 1298 (D.C. Cir. 1989).
40. *Id.* at 1305.
41. Air Transp. Ass'n v. Department of Transp., 900 F.2d 369 (D.C. Cir. 1990).
42. *Id.* at 376.

substantially affect a civil penalty defendant's *right to an administrative adjudication.*"[43] The court held that the FAA, in drafting these rules of practice, made choices concerning what process civil penalty defendants were due. "Each one of these choices 'encode[d] a substantive value judgment' . . . on the appropriate balance between a defendant's *rights* to adjudicatory procedures and the agency's interest in efficient prosecution."[44] The court stated that in using the terms "rules of agency organization, procedure or practice, . . . [Congress] intended to distinguish not between rules affecting different *classes of rights*—'substantive' and 'procedural'—but rather to distinguish between rules affecting different *subject matters*—'the rights or interests of regulated' parties, . . . and agencies' 'internal operations.' "[45]

D. "Regulating primary conduct"

The dissent in *Air Transport* strongly disagreed with the appropriateness of eliminating the procedure/substance distinction. While recognizing its difficulty of application, the dissent noted that it was Congress that had established the distinction, and that Congress did not say that rules become less procedural simply because they are significant.[46]

The dissent proposed the following distinction as consistent with the APA: "If a given regulation purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute, it is not procedural, it is substantive."[47] Recognizing that agency rules must fall somewhere on a continuum from procedural to substantive, the dissent took the view that the FAA's rules of

43. *Id.* (emphasis in original). The court cited as its authority for this rationale its earlier opinion in National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967). The court cited this case for the proposition that a rule affecting the right to avail oneself of an administrative adjudication is not within the express terms of § 553(b)(A). However, *National Motor Freight* involved a situation where the agency created a reparations scheme without any statutory authorization. Moreover, the language quoted by the *Air Transport* majority was not part of the holding in *National Motor Freight*; it was simply an observation that a shipper's right to avail itself of the reparation proceeding was not trivial "simply because it is optional." *National Motor Traffic*, 268 F. Supp. at 96.

In the *Air Transport* case, there was express statutory authority for administrative adjudication.

44. 900 F.2d at 376 (emphasis in original).

45. *Id.* at 378. The court also held that the FAA could not rely on the "good cause" exemption because (1) a statutory deadline does not automatically confer good cause, and (2) the agency's "own delay" in taking action undercut its invocation of that exemption. *Id.* at 379.

46. *Id.* at 381.

47. *Id.* at 382.

practice, "which deal with enforcement or adjudication of claims of violations of the substantive norm but do not *purport* to affect the substantive norm[,] . . . are . . . clearly procedural."[48]

III. Developing a Workable Test

While most generally agree that a line needs to be drawn between what is covered by the exemption and what is not, the cases discussed above demonstrate the difficulty in drawing such a line.

Ultimately, the "procedure is procedure" test is unhelpful because substance can be masked as procedure. Therefore, an agency's label may be unreliable.[49] On the other hand, when a rule deals with the processes an agency uses or intends the public to use in its rulemaking or adjudications, it has been generally considered procedural for the purposes of the APA exemption (until the *Air Transport* case).

The "encodes a substantive value judgment" test is also problematic. Courts have either not engaged in useful analysis or they have used the test in a way that could effectively eliminate the statutory distinction between procedural and substantive rules. In *Reeder v. FCC*, the court applied the test without substantial discussion, although the result was probably correct because the assertedly procedural rule modified the substantive regulatory program. In contrast, the D.C. Circuit in *Air Transport* applied the test by looking at how the rule balanced interests in procedural due process, rather than whether the procedural rule affected the substance of the behavior the agency is charged with enforcing in civil penalty proceedings (i.e., aviation safety).[50] Under such an application, no agency rules of practice would likely qualify as exempt because all procedures that in *any way* involve the public's interaction with an agency necessarily involve a balance between agency interests and those of the public.[51] Moreover, the court's rejection of the procedure/substance dichotomy in favor of a "functional analysis" clearly

48. *Id.* (emphasis in original).

49. *See* General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (relying on EPA label of "interpretive rule"), *cert. denied*, 471 U.S. 1074 (1985); Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980) (explaining that agency's label is not dispositive).

50. It seems unlikely that the procedures that would apply in an adjudicatory hearing on civil money penalties would have much impact on industry compliance with air safety regulations.

51. *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (stating that agency interests must be balanced with private interests and risk of erroneous decisions in procedural due process cases). As Judge Silberman's dissent in *Air Transport* put it, "It will be impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural." 900 F.2d at 381.

undercuts the APA's statutory distinction between "rules of procedure" and "substantive rules."[52]

The "substantial impact" test is similarly flawed. It focuses not on the nature of a rule's impact, but solely on the magnitude of that impact. Such a distinction ignores the congressional intent to treat procedural rules differently from substantive rules.[53] A rule does not become less procedural merely because it affects a large number of people. Moreover, the test ultimately provides little guidance. Because the "substantiality" of a rule's impact can often be judged only in retrospect, this would require prudent agencies to put rules out for notice and comment even where it should not be required.

The "primary conduct" test proposed by the *Air Transport* dissent is an improvement on the tests that currently exist.[54] It looks at "primary conduct," namely, the type of underlying activity that is subject to the agency's regulation. To the extent that an agency's "procedural rule" meaningfully affects such behavior, it is—regardless of its label—"substantive," and therefore should be subject to notice-and-comment requirements (unless it falls within the scope of another exemption). A similar test would apply in the context of government programs,[55] where regulation is often directed not at conduct or behavior, but at eligibility. If the procedure meaningfully affects the standards for eligibility, it would likewise cease to be "procedural" and become "substantive."[56] Although this test does not always provide an

52. Although the term "substantive rule" does appear in 5 U.S.C. § 553(d) (1988), the clearest distinction appears in the publication section (now § 552(a)(1)(C) and (D), formerly § 3(a) of the original APA). The ATTORNEY GENERAL'S MANUAL, *supra* note 21, at 22, *reprinted in* ACUS FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (2d ed.) at 88, also makes great use of the term "substantive rules."

53. See the ATTORNEY GENERAL'S MANUAL which explains that the notice-and-comment rulemaking procedures (originally found in §§ 4(a) and 4(b) of APA) are "applicable only to substantive rules" and not to "rules of organization and procedure." ATTORNEY GENERAL'S MANUAL, *supra* note 21, at 30, *reprinted in* ACUS FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (2d ed.) at 96.

54. Hauser also looks favorably on the test proposed by Judge Silberman. "The 'primary conduct' test proposed in the *Air Transport* dissent is an attempt to update the antiquated 'substantial impact' test." Hauser, *supra* note 1, at 553.

55. The term "program" as used here is intended to be interpreted broadly, to include, among other things, those involving benefits, grants, contracts, permits, licenses, and loan guarantees. Rules relating to grants and benefits are exempt from notice and comment, 5 U.S.C. § 553(a)(2) (1988). However, the Conference has recommended eliminating this exemption, "ACUS Recommendation" 69-8, *supra* note 18. In addition, many agencies have voluntarily waived their use of it. *See* 24 C.F.R. § 10.1 (1990) (Dep't Housing and Urban Development); 29 C.F.R. § 2.7 (1990) (Dep't of Labor).

56. *See* Fugere v. Derwinski, 119 DAILY WASH. L. REP. 289 (Feb. 11, 1991) (C.V.A. 1990) (holding departmental manual provision affecting eligibility for disability benefits to be substantive); Air Transp. Ass'n v. Department of Transp., 900 F.2d at

absolutely clear result, it creates a somewhat brighter line, and has the advantage of emphasizing whether the rule has a *substantive* effect rather than a *substantial* effect, thus placing the focus on the nature of the impact and retaining the distinction between procedure and substance.

It is important to remember that, while a procedural rule may be issued without notice and comment, this does not preclude challenges to the rule's contents. The provisions of such a rule must be consistent with the applicable statute, APA requirements, and the Due Process Clause of the Constitution.[57] The rule must also not be arbitrary, capricious, or an abuse of discretion.[58] Moreover, someone interested in placing their views before the agency on a procedural rule may file a petition for rulemaking requesting a change in the rule at any time.[59]

We therefore recommend that the Conference urge agencies (and reviewing courts) to employ the following standards when deciding whether rules are procedural and, thus, legally exempt from notice-and-comment requirements: a rule is procedural and, thus, exempt from notice and comment only if (a) the rule relates to agency procedures (either methods of internal operations or agency methods of interacting with the public), and (b) the rule does not meaningfully affect (i) conduct, activity, or a substantive interest that is the subject of agency regulation, or (ii) the standards for eligibility for government programs.[60]

382-83 (Silberman, J., dissenting) (acknowledging that rules altering benefits eligibility are substantive). *Cf.* Batterton v. Marshall, 648 F.2d 694, 702-03, 707-08 (D.C. Cir. 1980). Some agencies, with court approval, have invoked the procedural rule exemption for enforcement manuals issued for the purposes of setting out the agency's policies in prosecuting enforcement actions. *See* American Hosp. Ass'n v. Bowen, 854 F.2d 1037 (D.C. Cir. 1987) (reviewing Medicare enforcement guidelines); Department of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984) (reviewing OSHA inspection targeting plan). While enforcement manuals can be analyzed as to whether they are or are not "procedural" as suggested by this article, it is likely that the more salient claim would be that such manuals fall within the exemption for "interpretative rules [or] general statements of policy.". *See* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.) (holding that OSHA inspectors' guidelines are policy statement).

57. *See* 5 U.S.C. § 706(2)(B)-(D) (1988).

58. *Id.* § 706(2)(A).

59. *Id.* § 553(e) (requiring agencies to allow persons to petition for amendment of rules). *See also* PETITIONS FOR RULEMAKING, ACUS RECOMMENDATION NO. 86-6, 1 C.F.R. § 305.86-6 (1992); William V. Luneberg, *Petitions for Rulemaking, Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS RECOMMENDATIONS & REPORTS 493, *reprinted in revised form*, William V. Luneberg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1.

60. In ACUS RECOMMENDATION 92-1, the Administrative Conference has chosen to use the term "significantly" rather than "meaningfully." See ¶ 3 (Appendix). The

This proposed recommendation would interpret the procedural rule exemption to place certain types of rules, such as rules governing conduct of formal adjudication or ex parte rules, outside the mandatory notice-and-comment requirements. This does not mean that agencies should be discouraged from voluntarily using such procedures in their promulgation. The Conference is on record as generally favoring the use of notice and comment because of its recognized advantages,[61] including (1) providing the agency with valuable input from the public, including information about the impacts of the rule and other information the agency may not have at its disposal; and (2) providing enhanced legitimacy and public acceptance of rules that comes from having public participation in the process.

The Conference should therefore recommend that agencies voluntarily provide an opportunity for notice and comment with respect to certain types of procedural rules. When considering promulgating procedural rules, agencies should weigh the benefits of notice and comment against the costs. This proposal recognizes that there can be substantial costs associated with notice-and-comment rulemaking. Although the section 553 procedures are not onerous, there is a cost (of approximately $400 per page) for *Federal Register* publication. Notice-and-comment procedures also expend additional agency time and energy. The benefits of notice and comment, however, can be substantial. Particularly where the rules at issue involve procedures to be used in new administrative adjudication programs or major modifications of existing procedures, providing notice and comment will offer the advantages mentioned above. Where minor or technical changes to rules of practice are involved, notice-and-comment rulemaking would be unnecessary. The most difficult question, of course, arises where rules are minor to some and more significant to others. In those situations agencies should err on the side of openness and should provide an opportunity for advance comment unless they are convinced that the cost-benefit ratio is disproportionate. In fact, agencies have reported that they generally do provide opportunity for notice and comment for rules of procedure or practice.[62]

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authors prefer "meaningfully," which they believe focuses more on the qualitative rather than the quantitative aspects of the impact. However, "significantly" is an acceptable substitute. The authors recognize that the precise meaning of both words is difficult to articulate.

61. *See generally* ACUS RECOMMENDATION NO. 69-8, *supra* note 18.

62. We have had the opportunity to review agency responses to an American Bar Association questionnaire on the extent to which agencies use notice-and-comment procedures in promulgating rules of procedure and practice (copies on file with Administrative Conference). We have also reviewed comments from agency general counsels on

Adding a proposal stage to agency rulemaking might also produce additional review by the Office of Management and Budget (OMB). Executive Order 12,291,[63] which established the authority and framework for OMB review of agency rulemaking, includes rules "describing the procedure or practice requirements of an agency" among those that are subject to review.[64] The Executive Order also provides that agency rules be submitted to and receive clearance by OMB at both the proposed and final stages. Clearly, such review can be time-consuming. Agencies may be discouraged from voluntarily using notice and comment because its use could produce additional delays at the review stage.

Because it would be counterproductive to discourage the use of notice-and-comment rulemaking in the case of procedural rules, the Conference should recommend that OMB refrain from reviewing proposed rules fitting the definition of procedural rules, where an agency has voluntarily chosen to use the notice-and-comment process.[65]

CONCLUSION

Considerable smog obscures the current state of the law as to which rules may be deemed exempt from the APA's notice-and-comment requirements as a rule of practice or procedure. Accordingly, we suggest that agencies, and reviewing courts, adopt a test that focuses on how the rule affects the underlying conduct that the agency is charged with regulating. We also recommend that agencies use notice-and-comment procedures on proposed regulations that might fall within the exemption where the benefits from public input outweigh the costs.

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the Conference's proposed recommendations. The responses indicate that most agencies generally do use notice and comment for such rules, although not for rules of agency organization. This may explain why there are relatively few cases addressing the applicability of the APA exemption. The responses to the questionnaire also indicate, however, that agencies do wish to retain their discretion to use the statutory exemption in appropriate situations.

63. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

64. The Executive Order does exempt from its coverage rules "related to agency organization, management, or personnel." *Id.* OMB officials have acknowledged in conversations with the authors that the Executive Order, by its terms, covers procedural rules exempt from notice and comment, but they also stated that OMB generally refrains from exercising its review over rules that are solely procedural in scope.

65. Although the subject is beyond the scope of this article, we would, for similar reasons, suggest that OMB should also refrain from reviewing proposed rules falling within other exemptions where the agency has voluntarily used notice-and-comment procedures. The Administrative Conference has frequently urged agencies to voluntarily eschew the invocation of rulemaking exemptions. *See* ACUS RECOMMENDATIONS, *supra* note 18.

APPENDIX

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES COMMITTEE ON RULEMAKING RECOMMENDATION 92-1, 1 C.F.R. § 305.92-1

THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

The Administrative Procedure Act, 5 U.S.C. § 553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exemptions. One of these exemptions, in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice."[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule has no clear answer.[3] The issue is in a state of flux.[4] Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.[5] Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

The Conference has long advocated the value of notice and comment in rulemaking,[6] and this recommendation encourages agencies to use

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1. The term procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules, policy statements, and situations where good cause exists. *See* § 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving military or foreign affairs, agency management or personnel, grants, loans, benefits, or contracts.

2. Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also* Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

3. There has been less debate about what are rules of agency organization.

4. Air Trans. Ass'n v. Department of Transp., 900 F.2d 369 (D.C. Cir. 1990), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *opinion vacated and petition dismissed on mootness grounds*, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

5. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1992); Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 C.F.R. § 305.73-5 (1992); Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5 (1992); Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 C.F.R. § 305.83-2 (1992).

6. *See* Recommendation 69-8, *supra* note 5.

such processes voluntarily in promulgating rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures, including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations[7] or methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.[8] Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

In order to encourage agencies voluntarily to use notice and com-

7. It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of § 553's requirements (including publication of a statement of basis and purpose and delayed effective date) as a "matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2)(1988).

8. The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. In this connection, it should be noted that many agencies, following Recommendation 69-8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating to loans, grants, benefits, or contracts.

ment, the Conference also recommends that the Office of Management and Budget refrain from exercising its jurisdiction to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

RECOMMENDATION

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rulemaking procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. § 553.[9]

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. § 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.[10]

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

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9. In some cases, the Conference has recommended that agencies generally use notice and comment, Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5 (1992); Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 C.F.R. § 305.83-2 (1992). In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 C.F.R. § 305.69-8 (1992); Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 C.F.R. § 305.73-5 (1992).

10. The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. *See supra* note 8.